



**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC CIVIL CASE NO. 37 A OF 2012**

**KENYA INDUSTRIAL ESTATE LTD.....PLAINTIFF**

**=VERSUS=**

**1. MOHAMED ABDALLA**

**2. ALI ABDALLA**

**3. FAMAU MOHAMMED FAMAU.....DEFENDANTS**

**J U D G E M E N T**

**Introduction**

1. This suit was commenced by way of a Plaint. In the Plaint, the Plaintiff has averred that in the early 1990s, the Government, through the Commissioner of Lands, allocated it land measuring 4.84Ha in Malindi. However, it was not until 23<sup>rd</sup> February, 2010 that the Commissioner of Lands formally notified the Plaintiff of the allotment.
2. The Plaintiff has averred that it subsequently sub-divided the land to establish sheds for industrial incubation, the suit property being one of them and identified as Plot Number 37.
3. It is the Plaintiff's case that in February, 2012, it commenced construction works of a coconut factory on the suit property; that since 24<sup>th</sup> January, 2012, the Defendants have been trespassing on the suit property and that in the process, it has suffered damages and loss.
4. The Defendant is seeking for a declaration that it is entitled to exclusive and unimpeded right of possession and occupation of the suit property and general damages for trespass.
5. On the part of the 3<sup>rd</sup> Defendant, he averred in his Defence that he is the rightful beneficial owner of Plot Number 37, Malindi, having been allocated the plot by the Plaintiff on 5<sup>th</sup> December, 1995; that he is aware of the Plaintiff's project on the plot and that he is not aware of the acts of trespass alleged in the Plaint.
6. The 3<sup>rd</sup> Defendant has averred in his Defence that the 2<sup>nd</sup> Defendant moved and occupied the suit property because of the agreement of sale between himself and the 2<sup>nd</sup> Defendant and that if the Plaintiff had compensated him as agreed, he could have refunded the consideration paid to him by the 2<sup>nd</sup> Defendant.
7. It is the 3<sup>rd</sup> Defendant's Defence that he sold the suit property to the 2<sup>nd</sup> Plaintiff on 3<sup>rd</sup> October, 2009.

8. In the Counter-claim, the 3<sup>rd</sup> Defendant has prayed for a declaration that he is the lawful owner of the suit property.
9. In the Reply to this 3<sup>rd</sup> Defendant's Defence and Defence to counter-claim, the Plaintiff averred that the 3<sup>rd</sup> Defendant breached the conditions of the allotment of the suit property having put up structures without the approval of buildings plans by the Plaintiff; that the 3<sup>rd</sup> Defendant never became the beneficial owner of the suit property and that he could not therefore purport to transfer it to the 2<sup>nd</sup> Defendant.

### **The Plaintiff's case**

10. The Plaintiff's Industrial Estates Development and Incubation Services Officer, Pw 1, informed the court that Plot Number 37, the suit property, is a sub-division of the Plaintiff's land. It was his evidence that the Government allocated to the Plaintiff land measuring 4.84Ha to hold it in trust which it subdivided into several portions.
11. According to Pw 1, the Plaintiff started developing the suit property after it was issued with a letter of allotment in the year 2012. However, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stated interfering with the development of the plot.
12. It was the evidence of Pw 1 that the Plaintiff did allocate the suit property to the third Defendant sometimes in 1995 to develop it as an entrepreneur. Before developing the plot, the third Defendant was required to get approvals from the Plaintiff.
13. According to Pw 1, the suit property was not transferable and consequently the 3<sup>rd</sup> Defendant had no legal capacity to transfer it to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
14. Pw 1 stated in his evidence in chief that when the 3<sup>rd</sup> Defendant failed to meet the conditions of the allocation, the Plaintiff took over the plot and started developing it.
15. In cross-examination, Pw 1 stated that he did not know the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that he only came to Malindi when the Plaintiff started developing the suit premises.
16. Pw 1 informed the court that the mandate of the Plaintiff is to develop land allocated to it and rent it out to small and Medium Enterprises (SME's). It is for that reason that the Plaintiff offered to the 3<sup>rd</sup> Defendant the suit property in 1995.
17. Pw 1 denied of knowledge of any meeting between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect to the suit property.
18. It was the evidence of Pw 1 that the Plaintiff cancelled the letter of allotment in favour of the 3<sup>rd</sup> Defendant in the year 2009 although the Plaintiff was formally allocated the suit property in the year 2010. Before then, the Plaintiff was holding the suit land in trust for the government for the purpose of developing industrial shades on it.

### **The Defendant's case**

19. The 1<sup>st</sup> Defendant, 1DW1, informed the court that the 2<sup>nd</sup> Defendant is his son.
20. It was the evidence of 1DW1 that he has known the Plaintiff since 1980 having bought three shades from it.
21. According to 1DW1, he required more space next to his shades for the purpose of training people in carpentry. It was at that particular point that he identified the suit property which belonged to the 3<sup>rd</sup> Defendant.
22. After seeing the documents in respect to the suit property, it was the evidence of 1 DW1 that he discussed the issue of purchasing it from the 3<sup>rd</sup> Defendant with the Plaintiff's manager, a Mr. Kamande, who agreed to the proposal.
23. An agreement of sale was then entered into between the 3<sup>rd</sup> Defendant and the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant was paid the purchase price in full.
24. After purchasing the suit property from the 3<sup>rd</sup> Defendant, it was the evidence of 1DW1 that he travelled to Nairobi and met the Plaintiff's senior officers and entered into an agreement with them in respect to the training school that he intended to put up on the suit property.
25. However, 1 DW1, informed the court that after he deposited building materials on the suit

- property, the Plaintiff's representative informed him that the Plaintiff intended to develop the plot itself and suggested to the 1<sup>st</sup> Defendant that it could give to him an alternative plot which he agreed. However, while waiting to be allocated the alternative plot, it was the evidence of 1DW 1 that the Plaintiff, using the police, forcefully moved his material out of the suit premises and assaulted 2DW1 in the process.
26. It was the evidence of 1DW1 that the 3<sup>rd</sup> Defendant was paid Kshs.500,000/- for the plot which money has never been refunded.
  27. In cross-examination, 1DW1 stated that when he bought the suit property, it was vacant.
  28. It was the evidence 1DW1 that he approached the 3<sup>rd</sup> Defendant for the purchase of the suit property in the year 2011 and that he was not aware that at that particular time, the letter of allotment in favour of the 3<sup>rd</sup> Defendant had been revoked by the Plaintiff.
  29. 1 DW1 admitted that although he held meetings with the Plaintiff's representatives, nothing was reduced into writing in respect to the suit property.
  30. The 2<sup>nd</sup> Defendant, 2DW1, informed the court that he owns a shade opposite the suit property together with his father, the 1<sup>st</sup> Defendant.
  31. It was the evidence of 2 DW1 that him together with the 1<sup>st</sup> Defendant had interests in the suit property and when they made inquiries from the Plaintiff's representatives, they were informed that the plot belonged to the 3<sup>rd</sup> Defendant.
  32. It was with that realization that they brought the suit property from the 3<sup>rd</sup> Defendant for Ksh.550,000 and immediately informed the Plaintiff about the purchase.
  33. After the said purchase, it was the evidence of 2DW1 that they took possession of the plot and fenced it. However, the Plaintiff's representative later on told them that the Plaintiff wanted to develop the suit property where upon they threw their building materials out.
  34. According to 2 DW1, he was never informed of the alleged revocation of the 3<sup>rd</sup> Defendant's letter of allotment by the Plaintiff before they purchased the land from it.
  35. In cross-examination, 2 DW1 admitted that according to the letter of offer that was given to the 3<sup>rd</sup> Defendant, he could not sell the suit property without the Plaintiff's approval. It was his evidence that he did not know that the 3<sup>rd</sup> Defendant was in breach of the terms of the letter of offer.
  36. The 3<sup>rd</sup> Defendant, 3DW1, stated that he was allocated the suit property by the Plaintiff on 5<sup>th</sup> December, 1995.
  37. It was his evidence that even after allocating him the plot, the Plaintiff frustrated his efforts to develop it.
  38. According to 3DW1, the local manager of the Plaintiff, a Mr. Kamande, advised him to sell the suit property to the 2<sup>nd</sup> Defendant which he did. 3DW1 produced in evidence, the letter of offer dated 7<sup>th</sup> December, 1995 and the agreement of sale as 3DEXB 1 and 2 respectively.
  39. However, he later on came to learn that the Plaintiff had forcefully taken over the suit property from the 2<sup>nd</sup> Defendant and on inquiry, he was informed that the Plaintiff wanted to develop the plot on behalf of the people of Malindi.
  40. It was the evidence of 3DW1 that he was told to inform the Plaintiff in writing that he had no objection with the Plaintiff taking over the suit property on condition that the Plaintiff compensates him so as to enable him to re-pay the Kshs.500,000 that had been paid to him by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 3<sup>rd</sup> Defendant produced the letter as 3D exhibit 4.
  41. In cross-examination, 3DW1 informed the court that he never presented to the Plaintiff any drawings for approval after he was allocated the land. It was his evidence that he was forced by a Mr. Kamande to sell the suit property and that he believed it was Mr. Kamande, through the 2<sup>nd</sup> Defendant, who was buying the plot.
  42. According to 3DW1, he believed that the Plaintiff had consented to the sale of the of the plot in view of the fact that it was a Mr. Kamande who had told him to sell the suit property.
  43. It was the 3<sup>rd</sup> Defendant's case that he wants to be compensated because the plot was his before he sold it to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**The Plaintiff's submissions:**

44. The Plaintiff's advocate submitted that the Plaintiff was mandated to conditionally allocate the suit plot to qualified entrepreneurs for industrial development purposes and not for sale, which conditions the 3<sup>rd</sup> Defendant did not comply with. Counsel submitted that in any event, the sale agreement dated 3<sup>rd</sup> September, 2003 between the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was invalid in view of the provisions of section 3(3) of the law of contract Act because it was not witnessed. Further, it was submitted, no stamp duty was paid for the agreement.
45. Counsel submitted that the agreement that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into with the 3<sup>rd</sup> Defendant over the suit property is null and void.
46. According to counsel, it is the Plaintiff who is entitled to exclusive possession of the suit property together with general damages for trespass.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's submissions:**

47. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's advocate submitted that the Plaintiff, as a trustee, allocated the suit property to the 3<sup>rd</sup> Defendant and that the Plaintiff knew of the sale of the land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants because Mr. Kamande, the then Estate Manager, was in the picture and was instrumental to the transaction.
48. Counsel submitted that the Plaintiff's employees misled the 1<sup>st</sup> and 2<sup>nd</sup> Defendants into believing that they were to be given an alternative shade.
49. Counsel submitted that the Plaintiff had not proved that the Defendants trespassed into the suit property because the Plaintiff did not have possession of the land before the y lodged the claim in court.

#### **The 3<sup>rd</sup> Defendant's submission:**

50. The 3<sup>rd</sup> Defendant's advocate submitted that the Plaintiff's Manager convinced the 3<sup>rd</sup> Defendant to sell the suit property and consequently her client cannot be accused of not having sought the consent of the Plaintiff before transferring it.
51. On the issue of trespass, the 3<sup>rd</sup> Defendant's advocate submitted that the 3<sup>rd</sup> Defendant was in the suit property when the Plaintiff commenced its project; that it is the 3<sup>rd</sup> Defendant who should be compensated .

#### **Analysis and findings:**

52. The uncontroverted evidence by Pw 1 was that the Government allocated the Plaintiff land measuring approximately 4.84Ha within Malindi Municipality to hold it in trust for the Government in the early 1990's.
53. The land was then subsequently sub-divided by the Plaintiff for purposes of industrial incubation in line with the Plaintiff's legal mandate. One of the plots that was created from the said land is plot number 37, the suit property.
54. The 3<sup>rd</sup> Defendant was allocated plot number 37 by the Plaintiff vide a letter of allotment dated 5<sup>th</sup> December 1995.
55. The said letter of allotment had six (6) conditions which bound the 3<sup>rd</sup> Defendant. The third, fourth, fifth and sixth conditions provided as follows;-

**“3. that you utilize this plot for industrial purpose only as is indicated in your application, that is for welding works.**

**“4. that your project will be designed to consider environment issues**

**“5. that K.I.E will approve the building plans for your project before they are submitted to the relevant local authority**

**“6. that the plot is not transferable without K.I.E approval.**

56. The 3<sup>rd</sup> Defendant was supposed to accept the offer within 30 days in writing and upon payment of Kshs.10,000/-
57. It was the evidence of the 3<sup>rd</sup> Defendant that his efforts to develop the suit property as per the letter of offer were frustrated and on the advice of the Plaintiff's Estate Manager, a Mr. Kamande, he sold the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
58. The sale agreement further indicates in special condition number B (1) that before the completion date, the 3<sup>rd</sup> Defendant was to deliver to the purchaser's advocate a letter of consent to transfer from the Plaintiff.
59. It is therefore obvious that the letter of allocation by the Plaintiff dated 5<sup>th</sup> December, 1995 required the 3<sup>rd</sup> Defendant to obtain the consent of the Plaintiff before he could sell the suit property. The Plaintiff being a wholly owned government institution and duly established by an Act of Parliament could not give such consent orally as stated by the 3<sup>rd</sup> Defendant. The authority to sell the suit property by the Plaintiff could only be in writing and not otherwise.
60. In any event, it would appear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were well aware that indeed the suit property belonged to the Plaintiff, and the same could not be legally sold to them by the 3<sup>rd</sup> Defendant without the consent of the Plaintiff. That is captured in the sale agreement that they signed.
61. It therefore does not make sense how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeded with the sale of the suit premises without the consent of the Plaintiff in writing.
62. In view of the fact there is no evidence that the 3<sup>rd</sup> Defendant accepted the offer by the Plaintiff, and considering that he did not develop the property as per the terms of the letter of offer, the Plaintiff was entitled to take over the suit property either from him or from any other person he purported to have sold it. The purported sale of the suit property by the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was null and void.
63. In the circumstances, I am satisfied that it is the Plaintiff who is entitled to the suit property and not the Defendants.
64. However, the Defendants cannot be accused of having trespassed on the suit property considering that it is the Plaintiff who put the 3<sup>rd</sup> Defendant in possession of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants then bought the suit property from the 3<sup>rd</sup> Defendant.
65. It was only upon the cancellation of the letter of offer that the Plaintiff took over the suit property. The Defendants cannot therefore be blamed for being in possession of the suit property.
66. Indeed, this suit was unnecessary in the first place considering that the Plaintiff is in possession of the same.
67. In the circumstances, I allow the Plaintiff's Plaint dated 8<sup>th</sup> March, 2012 in the following terms:
- a. **A declaration be an is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Malindi Municipality Plot No. 37.**
  - b. **Each party to bear its/his own costs.**

Dated and delivered in Malindi this 28<sup>th</sup> day of November, 2014.

**O. A. Angote**

**Judge**